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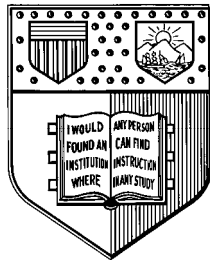
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Personal Integrity and the Conflict Between Ordinary and Institutional Values
W. Bradley Wendel*

I. Two Distinctions in Legal Ethics: Ordinary and Institutional Values and Agent-Neutral and Agent-Relative Reasons.

Values, which give us reasons for acting in certain ways, may be properties of both “natural,” pre-institutional states of affairs and relations among persons, as well as states of affairs and relations among persons that are constituted and regulated by social and political institutions.¹ We can call these ordinary moral values and institutional values, respectively. Ordinary moral values give reasons for all persons to do something or refrain from doing something. For instance, the value of human dignity gives all persons a reason to avoid humiliating others, and the value of truthfulness gives a reason not to lie. By contrast, institutional values give reasons only for those persons who work within an institution, or who may be described as having “opted in” to a particular social role — say, that of soldier, monk, judge, or lawyer. The value of impartiality is a reason for a judge to set aside her prejudices and decide a case on the merits, even though there may be nothing wrong, in ordinary moral terms, with believing that a person said by the police to have committed a crime is in fact guilty. Conversely, the value of partiality is associated with the role of lawyer in a client-centered, common-law legal system, in which litigated disputes are framed by the pleadings and legal

* Professor of Law, Cornell University. I am grateful for the comments and suggestions of participants in the “Professional Ethics and Personal Integrity” conference at the University of Auckland, where a version of this paper was presented, to Ben Zipursky for helpful criticism, and to Daniel Markovits for responding to a draft of the paper and for ongoing discussion of his project.

¹ Here I am using the term “value” in Scanlon’s buck-passing sense of something’s having properties that provide reasons for behaving in certain ways in regard to that thing. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 96 (1998).

arguments of the parties. From the institutional point of view, a lawyer or judge is expected to act on the basis of a restricted or role-specific set of moral values, as compared with the values that would inform the actions of a similarly situated non-professional.

The fundamental issue in legal ethics is often represented as a conflict between ordinary moral values and institutional values. As Charles Fried famously put it, “Can a good lawyer be a good person?”² As this question suggests, there may be actions permitted or mandated by a professional role that would be evaluated as moral wrongdoing if taken by a non-professional.³ Consider a mundane example such as impeaching the testimony of an adverse witness the lawyer knows (or at least has very compelling reasons to believe) is telling the truth. In ordinary moral terms, the lawyer has engaged in deception, defined as attempting to create a belief in others that is at variance with one’s own belief about the truth of the matter.⁴ From an institutional standpoint, however, the lawyer has contributed to a process that seeks to determine liability for punishment on the basis of fair procedures that respect the dignity of the defendant and place checks on police misconduct. There may be no way to enforce the requirement that the state prove its case beyond a reasonable doubt, without giving defense lawyers latitude to construct accounts of events inconsistent with the guilt of their clients — that is, to engage in deception.⁵

² Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

³ See Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J. L. & HUMAN. 209, 212 (2003) (“adversary lawyers commonly do, and indeed are often required to do, things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly immoral”).

⁴ See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1978).

⁵ See, e.g., John Mitchell, *Reasonable Doubts are Where You Find Them*, 1 GEO. J. LEGAL ETHICS 339 (1987).

However, participating in a practice of ritualized deception designed to secure the acquittal of one's client, never mind the client's factual guilt or innocence, would conflict with the moral commitments of most people, who believe themselves to have good reasons not to act dishonestly. As a result, when legal ethics scholars call upon lawyers to "accept personal responsibility for the moral consequences of their professional actions,"⁶ lawyers are placed squarely in between competing institutional and ordinary moral values.

Lawyers who wish to avoid the sting of being labeled as serial violators of moral obligations may attempt to describe their actions solely in terms of institutional values. As Arthur Applbaum has argued, however, descriptions in terms of ordinary moral values persist, so that the lawyer can be described as both a deceiver and a cog in some rights-protecting, truth-finding process.⁷ Given the persistence of ordinary moral descriptions, the fundamental ethical problem for lawyers may be reframed in terms of the priority of these two descriptions. The description in terms of institutional values (i.e. "vigorous cross-examination" instead of "deception") would be warranted in one of three situations. First, if the institutional setting were somehow to provide exclusionary reasons for action vis-a-vis ordinary moral values,⁸ then the description in terms of institutional values would be the sole evaluative perspective from which to judge lawyers' actions. Second, institutional values may be sufficiently weighty (although not exclusionary) that a person acting in an institutional capacity may conclude that the cross-

⁶ DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 66-67 (2000).

⁷ See ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PRIVATE LIFE, Ch. 5 (1999).

⁸ See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

examination is all-things-considered the right thing to do. The importance of the defendant's right to resist the state's attempt to deprive him of liberty may outweigh jurors' interests in not being deceived, and the witness's interest in not being humiliated by the cross-examination. Finally, in a concession to the persistence of ordinary moral description, the lawyer may argue that the cross-examination is not deceptive in ordinary moral terms, either on the basis of alleged epistemological uncertainty or by appealing to shared conventions regulating the communicative setting of trials, according to which triers of fact do not take the utterances of lawyers as representations of their belief in the truth.

If any of these three situations obtained, the lawyer would have a justification for what would otherwise be a wrongful action, if described in ordinary moral terms.⁹ Notice something significant about these patterns of justification: In each of these three situations, the argument appeals to values that are *agent-neutral*, in the sense that they refer to values that are “independent of the particular perspective and system of preferences of the agent”.¹⁰ The usual attempts to justify what would otherwise be wrongdoing by lawyers share this feature of making reference to values that are independent of the standpoint of the actor. It is generally taken for granted that the lawyer's own ideals and commitments are irrelevant, except to the extent that they overlap with what one (impartially speaking) ought to value and be committed to. The value of, for example, the rights of a criminal defendant or the impartial adjudication of disputes

⁹ For the justification/excuse distinction in criminal law, see, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 458-59 (1978); Kent Greenawalt, *The Perplexing Border of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

¹⁰ THOMAS NAGEL, *THE VIEW FROM NOWHERE* 170 (1986) (defining agent-neutral and agent-relative reasons).

does not depend on perspective of the lawyer herself — these things would be genuine objects of ethical concern even if the lawyer was not committed to them. As a result there may be a kind of gap between an agent’s own commitments and the values which inform the professional role within which she acts. This gap may lead to a sense of profound moral alienation, caused by the conflict between the impartially justified (or required) actions undertaken in a professional role and the things she values in her ordinary life, such as truth, avoiding humiliating others, and so on.¹¹

Although attempts to justify or excuse actions within professional roles generally refer to agent-neutral values, there is a significant movement in modern ethical theory which challenges the agent-neutral orientation of practical reasoning. Although virtue ethics may be the most obvious example, philosophers working within a broadly deontological orientation, such as Bernard Williams, Thomas Nagel, and Christine Korsgaard, have also sought a more important role for the ideals, commitments, and perspectives of particular persons. These interests are said to give rise to *agent-relative* reasons.¹² These commitments may be to ethical ideals, even understood impartially — for example, a person may make alleviating hunger or poverty into one of her life’s goals¹³ — but there is no necessary connection between impartial values and the

¹¹ See, e.g., Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1241 (1993) (observing that public defenders often become disillusioned or burned out, despite “the nearly universal view that effective representation of indigents in criminal cases is justified”). Ogletree cites several accounts written by public defenders — admittedly anecdotal evidence — in support of his claim that, “[w]hen faced with a conflict between her professional role and her visceral reaction to her clients, the lawyer finds little solace in the philosophical arguments.” *Id.* at 1242.

¹² See, e.g., Christine M. Korsgaard, *The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values*, in *CREATING THE KINGDOM OF ENDS* 275 (1996).

¹³ I am grateful to Daniel Markovits for pressing me to make this distinction clear.

agent's own ideals. Agent-relative reasons are not subjective or idiosyncratic, because any similarly-situated agent would recognize them, but they often arise only by virtue of someone having established relationships or made commitments that are not mandatory from a moral point of view.¹⁴ Relying on agent-relative values to inform action within professional roles thus seems to be a promising strategy for reducing the sense of alienation created by the gap between the agent's own commitments and the ethical demands of the role.

II. *Integrity in Legal Ethics.*

In this paper I am concerned with a particular kind of agent-relative values — namely, those related to a person's *integrity*, in the sense of maintaining fidelity over time to one's own commitments and loyalties.¹⁵ Borrowing a term from Bernard Williams, we can talk in terms of the ethical significance of a person's *ground projects*.¹⁶ Williams argues that without having certain sufficiently important desires, commitments, and interests, it would be unclear why one

¹⁴ Samuel Scheffler, *Projects, Relationships, and Reasons*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 247, 251-52 (R. Jay Wallace, et al., eds. 2004).

¹⁵ Thus, I prefer to bracket questions of whether other kinds of reasons within ethics are best understood as agent-neutral or agent-relative. For example, Thomas Nagel has argued that deontological considerations are actually agent-relative, and not the expression of neutral values of any kind. See NAGEL, *supra* note ___, at 176-78. Explaining deontological reasons in agent-relative terms does help make sense of the intuition that a moral dilemma is involved in cases where harm will result regardless of whether the agent causes some lesser harm. See Korsgaard, *supra* note ___, at 291-93. Despite this advantage, I think the better approach is to understand deontological values as deriving from the objective badness of the harm prohibited by the moral duty. In Nagel's view, what is wrong with violating deontological constraints is that the agent makes evil part of her intention. NAGEL, *supra* note ___, at 180. But there is a prior question which must be addressed, namely whether evil will occur. In a trolley-type case where one person is intentionally killed to save the lives of five, it can plausibly be argued that what occurred was not evil *if* a person could reasonably consent to the victim's treatment. See Korsgaard, *supra* note ___, at 297.

¹⁶ Bernard Williams, *Persons, Character, and Morality*, in MORAL LUCK 1, 12 (1981) (defining ground projects, as those commitments "which are closely related to [the agent's] existence and which to a significant degree give meaning to his life").

should bother going on living at all. This is not a contingent matter of the psychology of any particular agent; rather, it is a conceptual truth about persons. In his view, one's ongoing desires and commitments are a necessary condition of personhood, as a metaphysical matter.¹⁷ The unity of identity over time that is necessary to constitute a person requires that a would-be person be able to hold fast to his or her commitments. A so-called "later self" is related to my present self only insofar as those two selves are connected via relationships of commitment and interests to various things. Identification of the ground projects of an agent is logically prior to the conclusion that two selves, separated in time, are the same person. But the agent-neutral demand that all of one's actions be impartially justified severs the connection between the agent and her projects, for it is conceivable that morality may issue in an obligation that requires one to give up a project, at least for a time. But giving up a project even "for a time" threatens the unity of character that is a condition for the possibility of continuous selfhood over time. For these reasons, ethics must make room for people to pursue their projects, by granting moral permission to do something in furtherance of one's ground projects that would otherwise be wrong. If someone would otherwise be obligated (for utilitarian reasons) to contribute time, energy, and money to a cause such as relieving hunger, a ground project such as training for a marathon or learning to play all the Beethoven piano sonatas would create an excuse from what would otherwise be this moral obligation, even though there is no agent-neutral value in these projects that would make them morally obligatory for everyone.¹⁸

¹⁷ *Id.* at 8 (citing Derek Parfit's discussion of the metaphysics of personal identity in *Reasons and Persons*). See also Fried, *supra* note ____, at 1069 ("any concern for others which is a *human* concern must presuppose a concern for ourselves").

¹⁸ NAGEL, *supra* note ____, at 170.

Orienting legal ethics, to a greater or lesser extent, around the ground projects of individual lawyers may help reduce the tension between ordinary and institutional values. It has often been observed that relying on an agent-neutral justification for prioritizing institutional obligations over ordinary moral duties runs the risk of creating profound alienation in practitioners. Suppose the institutional values associated with the legal system operate either to create exclusionary reasons for action or outweigh ordinary moral values in the practical reasoning of a lawyer.¹⁹ The lawyer operating in this institutional context may correctly believe herself to be justified in doing things that would otherwise be morally wrong, but these institutional values may not be part of the ethical values and commitments that animate her day-to-day life outside the institutional context. As Gerald Postema has observed, the lawyer may find herself in the position of needing to connect with or detach from a set of values as she enters and leaves a professional role — metaphorically, when putting on or taking off her professional hat.²⁰ Unlike a hat, however, moral stances cannot be easily assumed or shed, at least if a person is acting in good faith. What is needed to ease the transition back and forth between ordinary and professional worlds is some kind of unifying deliberative framework that transcends the ordinary and institutional contexts. Unfortunately, this unifying framework might be a stance of

¹⁹ Recall that the third possibility for justification is that an action is not wrong in ordinary moral terms. For example, in the cross-examination case, the lawyer might argue that she does not know what the truth of the matter is. As the defense lawyer in *A Civil Action* memorably observed, “the truth is at the bottom of a bottomless pit.” See JONATHAN HARR, *A CIVIL ACTION* 340 (1995) (quoting Jerome Facher). In a great many contexts, however, lawyers believe themselves capable of ascertaining the truth. For example, when advising a client on whether or not to settle (or plead guilty), lawyers drop the pose of Cartesian doubt and counsel clients based on a common-sense epistemology which includes principles for judging the weight of evidence and the credibility of witnesses. In general, when faced with charges of moral wrongdoing, lawyers’ attempts at rebuttal in ordinary moral terms tend not to be successful. The more promising strategies of justification in legal ethics are the first two, appealing to either the exclusionary character or weight of institutional values. For that reason, I will concentrate on those patterns of justification in this paper.

²⁰ Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 NYU L. REV. 63 (1980).

detachment from the moral convictions she had considered important in her pre-professional moral life.²¹ The lawyer might avoid endorsing this attitude, believing it to be just an elaborate sham or performance, but this stance of detachment risks turning into more pervasive cynicism or skepticism about morality generally.

Although Postema does not use this terminology, the problem he identifies is an instance of the conflict between agent-neutral and agent-relative values. The solution he recommends is to imagine some way for lawyers to bridge the “discontinuities in the moral landscape” with a “unified conception of moral personality.”²² In other words, he seeks to restore personal *integrity* to its rightful place in professional ethics. He argues, in effect, that lawyers should make institutional values part of their own set of desires and commitments, that is, to turn to ground projects and their associated agent-relative values for justification. Ordinary moral values and institutional values are not in tension if a person adopts ideals and attachments that are coextensive with the social goods and values served by the role.²³ For example, if the legal system and legal profession in a society are designed to protect individual rights, and a person believes strongly in working for the protection of individual rights, then working as a lawyer creates no conflicts between personal attachments and professional obligations. A lawyer can therefore take advantage of a justification for her actions, and avoid the alienation that is created by oscillating back and forth between ordinary and institutional evaluative standpoints, by

²¹ *Id.* at 78.

²² *Id.* at 82.

²³ *Id.* (“Each lawyer must have a conception of the role that allows him to serve the important functions of that role in the legal and political system while integrating his own sense of moral responsibility into the role itself.”).

incorporating institutional values into her own set of ordinary ethical ground projects. A lawyer employing this strategy of incorporation would not face the problem that institutional values may require the lawyer to “engage in activities, make arguments, and present positions which he himself does not endorse or embrace.”²⁴ This “incorporationist” solution, elaborated with reference to Christine Korsgaard’s Kantian constructivist moral theory, is the subject of Section III of this paper.

Section IV will discuss a very different, and much stronger view of the role of integrity in legal ethics, advanced by Daniel Markovits. In a rich and complex paper, which has been expanded into a forthcoming book, he argues that the standard debate legal ethics has gotten everything backwards, by trying to evaluate the conduct of lawyers in terms of agent-neutral values.²⁵ Markovits objects to the “hegemonic claim of third-personal morality.”²⁶ The third-personal or agent-neutral perspective is deficient because it fails to consider the “authorship” of actions — that is, the intimacy of the connection between a person (with her characteristic aims and projects) and what she does in the world.²⁷ Instead of worrying only about impartial value, lawyers should be primarily concerned for their own integrity, and only secondarily oriented toward the agent-neutral reasons that are usually given by way of justification. This is a strong version of the familiar position that people may be justified in reserving special concern for

²⁴ *Id.* at 77.

²⁵ *See* Markovits, *supra* note ____.

²⁶ *See id.* at 242.

²⁷ *Id.* at 224.

friends, family members, and others with whom they are in intimate relationships. Some agent-relative values take precedence over impartial ethical concerns because “we should attend to the interests of our associates, even if doing so means that the comparable interests of other equally worthy people will go unsatisfied.”²⁸ Charles Fried famously attempted to analogize the lawyer-client relationship to close personal relationships, in which people are permitted to hold something of themselves in reserve from the universalizing demands of impartial morality.²⁹ Markovits goes much farther than Fried, however, by insisting that an agent’s connection to a course of action can matter more than the rights of other affected persons or the state of affairs thereby brought into existence.³⁰ This argument is partially axiological, and is based on a non-teleological theory of value in which value inheres not in states of affairs in the world or in relations among persons.³¹ Even accepting for the moment the constructivists’ suggestion that value is a property of the rational will, Markovits’ position is still quite radical in its resistance to evaluating the ground projects of agents with reference to impartial values.

In Section V, I will discuss my claim that personal integrity should be at best of

²⁸ Scheffler, *supra* note ____, at 252.

²⁹ Fried, *supra* note ____, at 1071. Although this point is neither here nor there with respect to the issue of integrity taken up in this paper, it is worth noting that Fried’s argument ultimately does not depend on agent-relative values. Rather than taking the position that friendship is non-instrumentally valuable, Fried argues that the legal system is so complex that it is necessary to create an institutional actor, analogous to a “special-purpose friend,” who is capable of assisting citizens with their interactions with the law. *Id.* at 1073. Thus, the impartial value of the autonomy of all citizens lies behind the recognition of special moral privileges for “legal friends.” Fried’s statement that “[t]he lawyer acts morally because he helps to preserve and express the autonomy of his client vis-a-vis the legal system” *id.* at 1074, is an appeal to the agent-neutral value of autonomy, not the relationship the lawyer has established with the client.

³⁰ Markovits, *supra* note ____, at 240, 244.

³¹ *Id.* at 229-34.

secondary importance in legal ethics. First, reasoning on the basis of personal values is out of place in an institutional context that is not ultimately grounded on personal values. Law belongs to the domain of politics, this much is obvious, but it seems to have been taken largely for granted by theorists of the lawyering role that the political (that is to say institutional) values that inform a lawyer's professional activities are reducible to pre-political moral values. If, on the other hand, there is a distinctive political morality that arises in virtue of something's being described as "politics,"³² then the sorts of ordinary moral concerns that would ordinarily serve as the basis for organizing one's interests and ideals into a coherent life project would be out of place when one is thinking about one's professional life. Institutional morality need not be wholly independent of ordinary morality — and, it probably should not be — but if there are good moral reasons for recognizing an institutional practice with its own internal regulative standards, then the practice may create a kind of filter or preclusion of ordinary morality in the institutional or professional domain. The implication of this value pluralism is that a complex system of professional ethics, which is attentive to the demands of both agent-neutral and agent-relative values, should not attempt to reconcile impartial morality and personal integrity using some kind of priority procedure, or by reducing one set of values to the other. Instead, these two sources of value should be recognized as independent and autonomous. The further implication of the existence of autonomous domains of value is the possibility of dirty hands — i.e., that an action may be evaluated as wrong with reference to the values in one domain and permissible, or even mandatory, with reference to the values in the other.

³² See BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 5 (2005) (the demand for legitimacy "does not represent a morality which is prior to politics. It is a claim that is inherent in there being such a thing as politics").

The second line of objection to integrity in professional ethics is directed primarily against the strong claims of Markovits, that an agent's actions in conformity with her character, practical identity, or ground projects are immune to criticism based on impartial values. Impartial considerations must enter the analysis somewhere — either at the micro, case-by-case evaluative level, or at the level of adjudicating potential ground projects as either ethically admissible or inadmissible. The ground project of “pacifist” is admissible as a suitable focal point for organizing one's ethical commitments and actions, and one who is committed to this project may be excused for refusing to comply with what would otherwise be an ethically justifiable demand that one engage in military service. On the other hand, the ground project of “wiseguy” is not admissible, and one could not claim an exemption from an otherwise applicable ethical obligation, such as not to use violence to settle trivial disputes, on the basis of being committed to that ground project. The examples here are caricatures, as is Bernard Williams' hypothetical (appropriated by Markovits) of Jim and the Indians. The discussion can be made more realistic by considering the psychological mechanism by which a person might acquire new and pernicious ground projects through a process of cognitive dissonance reduction. David Luban's nicely paradoxical work on integrity develops a critique similar to what I am raising here — namely, that remaining true to one's commitments has ethical value only where those commitments have not been adversely influenced by the need to adapt to one's environment.³³ In order for considerations of integrity to justify or excuse what would otherwise be a moral violation, a person's ground projects must be morally worthy objects of concern. A person may

³³ See David Luban, *Integrity: Its Causes and Cures*, 72 *Fordham L. Rev.* 279 (2003).

decide to commit to one among a wide range of morally eligible potential ground projects,³⁴ but the eligibility analysis is logically prior to the evaluation that one is justified in acting in furtherance of one's ground projects. Thus, integrity is of secondary importance in comparison with the impartial values that constrain the adoption of ground projects.

III. *Korsgaard and the Incorporationist Solution.*

To understand the attraction of relying on agent-relative values in ethics, it may be helpful to take a brief metaethical detour. It is generally assumed, as Hume insisted, that it is in the nature of ethics that it must make a practical difference, by guiding action.³⁵ One of the central questions of ethical theory is therefore how anything in the natural world — anything we might call a “fact” or part of the “furniture of the universe”³⁶ — might give us a reason to act in a certain way. For any naturalistic property, we might imagine “clear-headed beings who would fail to find appropriate reason or motive to action in the mere fact that” the property obtains.³⁷ John Mackie's famous “argument from queerness” noted that if ethical values — which are intrinsically action-guiding and motivating — are somehow part of the fabric of the universe,

³⁴ The notion of “eligible” projects is taken from Raz's work on value, and is developed helpfully by Scanlon in a paper on what it means for something to be a reason. See T.M. Scanlon, *Reasons: A Puzzling Duality*, in WALLACE, *supra* note ____, at 231, 236

³⁵ See, e.g., Philippa Foot, *Does Moral Subjectivism Rest on a Mistake?*, 15 OXFORD J. LEG. STUD. 1, 3-4 (1995).

³⁶ So far as I know this term was first used in Ernest Gellner, *Analysis and Ontology*, 1 PHIL. Q. 485 (1951).

³⁷ For this way of putting G.E. Moore's open question argument, see Stephen Darwall, Allan Gibbard & Peter Railton, *Toward fin de siecle Ethics: Some Trends*, 101 PHIL. REV. 115, 117 (1992).

they would have to be very strange things indeed, which would be difficult to account for on a standard empiricist account of how we come to know something about the natural world.³⁸ The epistemological difficulties in coming to know about nonnatural properties are compounded by the need to rely on some kind of faculty of intuition capable of discerning these properties, which has an ambiguous relationship to other faculties such as sensory perception. As Stephen Darwall notes:

If something's being a right-making consideration is not a complicated sort of motivational property, a disposition to be impressed in certain ways by that consideration in certain circumstances, then what sort of property is it? The only alternative view seems to be a doctrine that requires both metaphysical and epistemological mystery: nonnatural properties and a special sort of intuition or insight to discern them.³⁹

Even if one can address the ontological and epistemological problems associated with realism, it is still a challenge to explain how the accurate perception of facts about the world necessarily motivates one who perceives them. Thus, it is a massive, pervasive conceptual error to talk as though there is a fact of the matter concerning ethical truth, at least if truth is understood as involving a correspondence relationship with values in the natural world.⁴⁰

Problems such as these have persuaded many that it is impossible to be a realist about the foundations of ethics. Alternatives to realist ethical theories relate meaning (and claims about the truth of propositions of ethics) to the natural world in a metaphysically straightforward way,

³⁸ J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 38-42 (1977).

³⁹ STEPHEN L. DARWALL, *IMPARTIAL REASON* 55 (1983).

⁴⁰ MACKIE, *supra* note ____, at 48-49.

but have a hard time answer accounting for the objectivity of ethical judgment. By essentially admitting that there is a gap between “is” statements about the natural world and normative “ought” statements about ethics, theorists who reject the inflationary metaphysics of moral realism seem to give up the possibility of grounding objectivity using anything like the methods of the empirical sciences.⁴¹ As Hilary Putnam and others have emphasized, however, there is no reason to think that objectivity in ethics will be secured using the same kinds of procedures that are used in the sciences.⁴² We know the moon is not made of cheese because we have brought back moon rocks and subjected them to physical and chemical analysis. Because we cannot verify ethical propositions by performing similar tests, it is tempting to conclude that we do not *know* the truth of something we believe to be true, e.g. that slavery is evil. As Putnam puts it, beyond being able to offer the sorts of arguments that one would ordinarily offer in support of the proposition that slavery is evil, there is no sense in which we can explain how this knowledge is possible in an absolute sense, and it is certainly not helpful to look to science for an explanation of how we know this.⁴³ As a matter of practical ethical reasoning, it is surely right that we have to do the best we can, and not worry too much about the ultimate foundations for these arguments. But the rejection of inflationary metaphysics need not push ethics too far in the

⁴¹ It should be noted that there are ways to be a moral realist without relying on inflationary metaphysics, for example by denying that we have non-ethical terms for all natural properties; it may be possible to maintain a form of moral realism in which ethical properties supervene on the basic nature of things in a way that is analogous to property identification statements in natural science, such as “water is H₂O.” *See, e.g.,* Nicholas L. Sturgeon, *Ethical Naturalism*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY* 91, 97-100 (David Copp. 2006). This non-reductive naturalism would deny that ethical properties are “projected” onto the physical world by humans, but it would nevertheless concede a shared causal-explanatory role for the natural world and human minds in constructing ethical judgments.

⁴² HILARY PUTNAM, *Objectivity and the Science/Ethics Distinction*, in *REALISM WITH A HUMAN FACE* 163 (James Conant ed. 1990).

⁴³ *Id.* at 176-77.

direction of an anti-theoretical stance. Even if we do not rely on truth-making properties in the natural world to underwrite the objectivity of ethical judgments, it may still be possible to establish an objective foundation for ethics in some aspect of the practical reasoning of agents.⁴⁴ Theories that begin with the structure of practical reasoning concede the discontinuity between ethics and science, but in doing so embrace the distinctiveness of ethical reasoning as a source of its authority.

Christine Korsgaard's moral constructivism is an attempt to establish an objective foundations for moral decisionmaking, but on a very different pattern from the claims to objectivity made by the sciences.⁴⁵ As an ethical constructivist, Korsgaard wishes to deny that there are moral facts or truths out there in the world somehow, which exist independently of procedures for discovering them.⁴⁶ This goes not only for the kind of moral facts as bizarre non-natural entities mocked by Mackie, but also for more modest contemporary versions of realism that attempt to locate moral value in natural facts such as pleasure and pain, desire and aversion.⁴⁷ The trouble with any *substantive* version of moral realism is that it gives an implausible answer to the problem of normativity. If someone asks, "Why should I do such-and-such?", a moral realist is bound to give an answer that refers to normative properties in the world, which it is possible to grasp, be motivated by, and have reasons to act on. But it is hard to

⁴⁴ Darwall, et al., *supra* note ____, at 131-38.

⁴⁵ See CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* (Onora O'Neill ed. 1993).

⁴⁶ *Id.* at 36.

⁴⁷ *Id.* at 40 (citing DAVID O. BRINK., *MORAL REALISM AND THE FOUNDATION OF ETHICS* (1989); Peter Railton, *Moral Realism*, 95 *PHIL. REV.* 163 (1986)).

see how any such properties can be action-guiding, as morality is supposed to be. Morality is a branch of practical, not theoretical reasoning.⁴⁸ It is concerned with what people have reason to believe, but only to the extent that this bears on the ultimate question of what people have reason to do.⁴⁹ (In any event, having knowledge about some property of the world leaves an open question — as Moore would put it⁵⁰ — about why one ought to care about the property that has been discovered and act on it. Even if some action is known to be “good,” what reason do we have for performing good actions? The normativity question concerns the transition from accurate perception of facts to reasons for action, so there is always an open question concerning the nature of the norm that prescribes action on the basis of perception of facts.⁵¹) As a result, argues Korsgaard, the central question for ethics is not how we have knowledge of ethical objects, or any sort of knowledge at all; rather, it is whether our reasons for action withstand the test of reflection.⁵² And this turns out to be a matter of personal integrity, as we will see.

Korsgaard’s ingenious answer to the problem of normativity is that the solution is implicit in an adequate description of the practical problem facing agents who must decide how

⁴⁸ Christine M. Korsgaard, *Realism and Constructivism in Twentieth-Century Moral Philosophy*, J. PHIL. RES. 99, 115 (Supplement 2003) [hereinafter, “Korsgaard, *Realism and Constructivism*”].

⁴⁹ KORSGAARD, *supra* note ____, at 44-47.

⁵⁰ See G.E. MOORE, *PRINCIPIA ETHICA* 17-19 (1903). For the continuing centrality of Moore’s open question argument to ethical theory, see Darwall, et al., *supra* note ____, at 116-19.

⁵¹ Korsgaard, *Realism and Constructivism*, *supra* note ____, at 110-12.

⁵² KORSGAARD, *supra* note ____, at 47.

to act.⁵³ Ethics is not about discovering truths, but about using reason to solve practical problems.⁵⁴ It is inherent in our nature as rational beings that we act on the basis of reasons. That is, we want to know why we should do something. For Korsgaard, the notion of a reason is bound up with reflection, which subjects inclinations and desires to the scrutiny of detached assessment. We may have desires, incentives, and interests, but they are not yet reasons for action. “The normative word ‘reason’ refers to a kind of reflective success.”⁵⁵ Our inclinations, desires, and so only become reasons after they pass muster, so to speak, when we endorse them after a process of critical scrutiny.⁵⁶ “Reflective success” must mean endorsement from the point of view of *something*; otherwise reflection would be an empty process. But from what standpoint is one to make that determination? This is where agent-relativity and personal integrity enters the picture for Korsgaard, as an alternative to the Kantian approach of seeking to ground the objectivity of ethics in the structure of the rational will.

A rigorous Kantian might focus on the choice-worthiness of an alternative, *qua* free and responsible being. A free will is self-determining; that is, it is not determined by any

⁵³ For a helpful overview of Korsgaard’s position, see William J. FitzPatrick, *The Practical Turn in Ethical Theory: Korsgaard’s Constructivism, Realism, and the Nature of Normativity*, 115 ETHICS 651 (2005).

⁵⁴ Korsgaard, *Realism and Constructivism*, *supra* note ____, at 115.

⁵⁵ KORSGAARD, *supra* note ____, at 93.

⁵⁶ *Id.* at 97; see also Christine M. Korsgaard, *Motivation, Metaphysics, and the Value of the Self: A Reply to Ginsborg, Guyer, and Schneewind*, 109 ETHICS 49, 50 (1998) [hereinafter “Korsgaard, *Value of the Self*”] (“Incentives operate on conscious beings causally, as a kind of attraction, but they do not by themselves cause actions. Incentives work in conjunction with what I will call principles, which determine the conscious being’s responses to those incentives.”).

“heteronomous” cause, including the desires and inclinations of the agent.⁵⁷ Although the free will must be determined by its own law, the will cannot be conceived as choosing for no reason.⁵⁸ It is inherent in the concept of agency that an agent needs *reasons* to act.⁵⁹ Otherwise an action is not willed — one is merely being blown about on the winds of desire, as opposed to acting freely and rationally. For Kant, the self-legislation of the will is therefore subject to the test of universalizability — whether it is possible for a rational being to will a maxim of action as a universal law.⁶⁰ This test guarantees that a free will chooses lawfully:

The problem faced by the free will is this: the free will must have a law, but because the will is free, it must be its own law. And nothing determines what that law must be. *All that it has to be is a law.*⁶¹

As a matter of the logical form of an unconditioned will, Kant’s approach is certainly coherent. But Korsgaard and many others have questioned whether the test of universalizability, by itself, gives sufficient content to a system of morality that actual human beings can live by.⁶² Conceiving of oneself as a member of the party of humanity, or a citizen of the Kingdom of Ends, may not be the kind of self-conception that can provide anything like a meaningful focal

⁵⁷ See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* *410 (James W. Ellington trans. 1981) (1785) (“the principles of morality are . . . to be found . . . completely a priori and free from everything empirical in pure rational concepts only”).

⁵⁸ KORSGAARD, *supra* note ____, at 97-98.

⁵⁹ Korsgaard, *Value of the Self*, *supra* note ____, at 62.

⁶⁰ KANT, *supra* note ____, at *421.

⁶¹ Korsgaard, *Realism and Constructivism*, *supra* note ____, at 114.

⁶² KORSGAARD, *supra* note ____, at 220-21

point for living a recognizably human life.⁶³ In this way, Korsgaard's neo-Kantianism shares common ground with Bernard Williams' emphasis on stable ground projects as a condition of agency. The difference is that, for Korsgaard, the source of value around which we organize our reflection is not an external object of commitment, but a way of conceiving of, and valuing, oneself. This is Korsgaard's notion of *practical identity* — "a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking."⁶⁴

Practical identity may express itself in familiar role terms — i.e. a person is a parent, someone's friend, a member of a religious or national community, and so on. In these cases, certain role-specific obligations are built right in to the description of the role.⁶⁵ Korsgaard's example is being a psychologist, and considering whether to violate the confidences of her patients — the normative "ought not" is part of the proper description of the role.⁶⁶ (The job description of a psychologist is thus a "thick" description.⁶⁷) Natural roles, such as the role of parent, similarly build to-be-doneness into their descriptions. One cares for one's children

⁶³ See also Barbara Herman, *Integrity and Impartiality*, in *THE PRACTICE OF MORAL JUDGMENT* 23 (1993).

⁶⁴ KORSGAARD, *supra* note ____, at 101.

⁶⁵ See TIM DARE, *COUNSEL OF ROGUES?* ____ (2007).

⁶⁶ KORSGAARD, *supra* note ____, at 101.

⁶⁷ Thick descriptions bridge the factual and evaluative domains, because a proper grasp of the factual description of an event commits one to an evaluation. Foot's example of "rudeness" is intended to show that a competent user of the language, who knew when it was appropriate to ascribe the label "rude" to behavior, grasps the meaning of "rude," including its evaluative aspects. See Philippa Foot, *Moral Arguments*, in *VIRTUES AND VICES* 96 (1978). One who did not describe an action from an ethical point of view would literally be unable to use a term like "rude" correctly.

because that is what it means to be a parent; there is no way to coherently describe the role of parent without including an obligation to care for one's children.⁶⁸ Significantly, and in response to one of the reasons suggested above for the resistance to agent-neutrality in ethics, practical identity serves both as a source of normativity and of moral motivation. One does not violate the obligations associated with one's practical identity because "to violate them is to lose your integrity and so your identity, and to no longer be what you are. That is, it is to no longer be able to think of yourself under the description under which you value yourself."⁶⁹ The role of integrity is therefore both to provide a standard for appraising the choice-worthiness of alternatives and to serve as a motivation to act on moral duties. In ordinary moral life we express this connection between obligation and motivation using expressions like, "I couldn't live with myself if I did that." In the context of professional roles, the practical cost of not complying with an obligation associated with that role would be giving up one of the ends for which the role is constituted, which was the reason for deciding to enter the role in the first place — this would be a kind of practical incoherence. Notice that this has the effect of closing up the gap between the sources of value that underlie a professional role and the agent's own commitments and values. Thus, the problem of alienation observed by critics of professional role-differentiated morality does not arise for someone whose practical identity is oriented toward the demands of the role.

I have referred to Korsgaard's emphasis on practical identity as the "incorporationist"

⁶⁸ See also Philippa Foot, *Goodness and Choice*, in FOOT, *supra* note ____, at 132, 137-38 (objects named in terms of their function, such as parents, incorporate evaluation into the ability to identify the object by that name).

⁶⁹ KORSGAARD, *supra* note ____, at 102.

solution to the problem addressed in this paper, namely whether a person can act within a professional role while remaining true to her own moral commitments and projects. The relevant incorporation occurs when the agent adopts the institutional values that are immanent in a professional role as part of her own ground projects. The incorporation need not be an explicit, voluntary act; more commonly, a person may have pre-existing commitments that happen to line up with institutional values. For example, a person may tend to feel empathy for disenfranchised people, and wish to support them in their struggles against injustice. If these commitments were sufficiently central, they might constitute a ground project (in Williams' sense) or the person's practical identity (in Korsgaard's sense), serving as a touchstone against which the choice-worthiness of an action is measured. As it happens, empathy, the desire to stand up on behalf of the oppressed, and perhaps even a sense of commitment to a class struggle are motivations that connect certain kinds of lawyers, such as public defenders, to the institutional values that underpin their role.⁷⁰ These commitments may have been formed prior to the person choosing the professional role of lawyer, may relate to the person's upbringing and environment, and may be only contingently related to the person's career trajectory, in the sense that they may not have

⁷⁰ Ogletree, *supra* note ___, at 1271. Markovits proposes a different kind of practical identity for would-be lawyers — not commitment to a value that is cognizable in ordinary life, such as fighting injustice or standing up for marginalized groups, but a value that is peculiar to the professional role. His proposal is that lawyers commit themselves to the ideal of *fidelity*. See Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 *FORDHAM L. REV.* 1367, 1391 (2006). The most important aspect of fidelity is self-effacement, i.e. striving to maintain no voice (and, presumably, moral commitments) of one's own while speaking on behalf of others. See Markovits, *supra* note ___, at 273. I will have more to say below about the ideal of self-effacement, but for now I will simply point out that unlike Ogletree's proposal of orienting the ethics of public defenders around values that have a great deal of appeal to many people in pre-professional life, Markovits' reliance on integrity depends on would-be lawyers making a highly idiosyncratic professional value into a central aspect of their ethical projects. It is easy to understand the psychological attraction of the project of struggling against unjust hierarchies, and therefore the reasons why this might become someone's central organizing ground project. It seems less plausible that there are many people who, apart from professional roles, are moved by the idea of emptying themselves, maintaining "unusually selfless empathy," and understanding themselves as "mouthpiece[s]." *Id.*

been the principal motivation for going to law school and taking a particular job. Nevertheless, the overlap between reasons of personal integrity — the agent-relative considerations that are central to the work of Williams and Korsgaard — and the obligations of the professional role eliminates the tension created by the conflict between ordinary and institutional values. The two kinds of values come together in a unified professional/personal conception of agency, which greatly simplifies the moral life of a person acting within a professional role. But this may be nothing more than a happy coincidence; nothing in Korsgaard’s argument obligates anyone to incorporate role-specific values into her practical identity. The possibility therefore remains of a lawyer whose practical identity is in tension with her role obligations.

IV. Markovits: The (Absolute) Priority of Integrity.

Daniel Markovits argues that the possibility of one’s practical identity conflicting with role obligations is not a marginal case, but is a pervasive feature of the ethical landscape for contemporary lawyers. Lawyers’ role-specific obligations require them to engage in what can only be described in ordinary moral terms as lying and cheating.⁷¹ These *prima facie* moral wrongs can be justified or excused on the basis of certain agent-neutral reasons (which Markovits refers to as third-personal, or impartial reasons),⁷² but it is unlikely that any of these reasons can

⁷¹ Markovits, *supra* note ___, at 217-18 (listing vices committed by lawyers, such as “papering cases, filing implausible claims and counterclaims, and delaying or extending discovery,” “badger[ing] and callously attack[ing] truthful but vulnerable opposition witnesses,” and “present[ing] colorable versions of the facts that they themselves do not believe”).

⁷² For his explanation for this choice of terminology, in preference to the distinction between agent-neutral and agent-relative, see *id.* at 223 n.31.

make up the kind of ground project that any person would want to adopt. Even if actions within a role are justified from an agent-neutral point of view, lawyers “will still need to construct a first-personal account of these practices that casts them as part of a life they can endorse, generating a self-understanding they can live with.”⁷³ Markovits’ point is not just a phenomenological one, that agents may experience sentiments of guilt, shame, regret, and so on, as a result of having transgressed some moral value despite having acted rightly on an all-things-considered basis.⁷⁴ Instead, Markovits wants to argue that the act is wrong, and it is wrong because of the agent’s relationship of *authorship* with the resulting harm.⁷⁵ Impartial reasoning, on the basis of agent-neutral values, fails to take seriously the intimacy of the connection between the actor and the wrongdoing.⁷⁶ Agent-relative reasons are permitted to trump agent-neutral values; as Markovits argues, “the degree of intimacy of [the agent’s] connection to a course of action may properly matter more to [the agent] than to third parties” who may be adversely affected if the agent refuses to engage in what the agent believes to be wrongdoing.⁷⁷

This sounds at first like an argument about nothing. One might object that if something is wrongdoing, then it is wrongdoing across the board, from an agent-neutral or an agent-relative point of view. In professional ethics, however, Markovits argues that there may be cases in

⁷³ *Id.* at 220.

⁷⁴ For the phenomenological argument for the existence of “moral remainders,” see CHRISTOPHER W. GOWANS, *INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING* 57, 88, 103, 117-18, and *passim* (1994).

⁷⁵ Markovits, *supra* note ____, at 224.

⁷⁶ *Id.* at 226.

⁷⁷ *Id.* at 240.

which the justified demands of the professional role require the agent to do something that would be wrong in ordinary moral terms, where the wrongness is a function of the agent's integrity, not the agent-neutral values that go into the justification of the professional role.⁷⁸ He develops this argument using the well known "Jim and the Indians" thought experiment proposed by Bernard Williams in his critique of utilitarianism.⁷⁹ Modifying the example slightly, suppose Jim is a famous American journalist who visits a South American country governed by a military dictatorship. In his travels, Jim happens upon a band of government troops holding twenty indigenous revolutionary fighters as captives. To make some sort of political point (this is obscure in Williams' example), the captain of the counterinsurgency force offers Jim a deal — if Jim himself shoots one of the prisoners, the troops will free the rest; if Jim refuses, the soldiers will immediately execute all the prisoners. This hypothetical is obviously fanciful, but the structure of Jim's dilemma is intended to sharpen and throw into relief the competing ethical positions. On a strict utilitarian analysis, not only must Jim shoot one prisoner, but this is an easy question. Critics are correct to point out that the confident assertion that this is an easy question is surely a deficiency in utilitarianism, since our pretheoretic moral intuition is that there is a wrenching dilemma for Jim, presented by the commander's offer.⁸⁰ On the other hand, a strict deontologist who refused to violate the rights of the one prisoner in order to save the others

⁷⁸ *Id.* at 261 ("The charge that lawyers lie, cheat, and abuse do not evaporate simply because the adversary system within which lawyers commit these vices is impartially justified.").

⁷⁹ *Id.* at 225-26; Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77, 98 (1973). Nagel has a similar example in *The View from Nowhere*, in which a traveler whose friends were injured in a car crash may obtain the keys to an unused car, and thus transport his friends to the hospital, only by twisting the arm of a small child in order to compel his grandmother to give up the keys. See NAGEL, *supra* note ____, at 176.

⁸⁰ See Korsgaard, *supra* note ____, at 292.

(because the morality of actions is assessed in accordance with the agent's will, not outcomes) also seems to miss the dilemmatic character of Jim's situation. It seems almost sanctimonious for Jim to insist on adhering to Kantian principles when shooting one prisoner would be the Pareto optimal result, in terms of violations of the rights of the prisoners. It is not difficult to imagine Jim being moved by the sacrifice of the oldest prisoner stepping forward and saying, "Please go ahead, shoot *me*, and I forgive you in advance."⁸¹ But even in the absence of such express consent, Jim might infer reasonable *ex ante* consent to employing a fair procedure to randomly select one prisoner to shoot — that one prisoner would be no worse off (since the soldiers were going to shoot him anyway), and the others are better off. Thus, any prisoner in that situation would consent in advance to the lottery procedure.⁸²

It is difficult to account for any sense of dilemma in this problem if ethical values are given only in impartial or agent-neutral terms. In terms of consequences, the death of twenty prisoners is obviously worse than the death of one; similarly, in terms of rights, the violation of the rights of twenty prisoners is worse than the violation of the rights of one. The dilemma arises only if we consider the relationship of the agent to the outcome.⁸³ Jim must incorporate evil into the description of his action — Jim's intent must be to shoot to kill, because otherwise he will

⁸¹ *Id.* at 296.

⁸² See APPLBAUM, *supra* note ___, at 155-62. This is the point of Korsgaard's metaphor of the smaller moral world, in which Jim and the prisoners are forced to regard the soldiers as forces of nature which limit their choices from what would have been available in an ideal world. See KORSGAARD, *supra* note ___, at 296. As I will discuss in the following section, professional ethics is the ethical system of a nonideal or smaller moral world, and therefore professionals may be involved in acts of justified wrongdoing.

⁸³ NAGEL, *supra* note ___, at 176. This is Markovits' point about authorship of wrongdoing. Even if there are agent-neutral reasons to kill one of the prisoners, Jim has a reason not to, because of the concern about being intimately connected with the killing. Markovits, *supra* note ___, at 226-27.

not succeed at his chosen end. The result of having collaborated with the captain is that Jim will have betrayed the ideals and ambitions that are constitutive of who he is as a person.⁸⁴ Moving from the fanciful example of Jim to the situation of lawyers acting within a professional role, Markovits argues by analogy that although certain actions may be impartially justified (just as shooting one of the prisoners is justified), they are incompatible with the ground projects of a person who has ethical ambitions “to be honest, to play fair, and to treat others kindly.”⁸⁵ Even if, let us suppose, vigorously cross-examining a truthful witness is justified because it contributes to a process that is generally effective at finding out the truth, it still requires the lawyer to take part *personally* in lying, cheating, and possibly humiliating another person. For the lawyer to fall back on the institutional values which justify the cross-examination is for the lawyer to, in effect, see herself as merely “a cog in a causal machine,”⁸⁶ rather than an autonomous moral agent with her own commitments and values.

I am sympathetic with the point made by Nagel, Markovits, and others, that abstracting away from the point of view of agents misses a distinctive kind of moral cost that falls on people who commit agent-neutrally justified harms to others. Nevertheless we should resist the conclusion that shooting one prisoner is therefore prohibited. As Nagel asks rhetorically:

The immediacy of the fact that you must try to produce evil as a subsidiary aim is phenomenologically important, but why should it be morally important? Even

⁸⁴ Markovits, *supra* note ____, at 238-39.

⁸⁵ *Id.* at 261, 270.

⁸⁶ *Id.* at 262.

though it adds to the personal cost to you, why should it result in a prohibition?⁸⁷

The problem with Markovits' exclusively agent-relative picture of values, in which Jim seeks to avoid entanglement with evil, is that it would eliminate the perspective of the victims, who would probably (and quite reasonably) prefer to take a one-in-twenty chance of death over a one hundred percent chance of death. If Jim insisted on his own moral purity, the nineteen un-saved innocent victims would seemingly have no right to object if Jim did not take the opportunity to kill one prisoner to save the rest."⁸⁸ As Korsgaard observes, if all of the moral reasons at play in this example were agent-relative, it would be none of the business of any of the prisoners what Jim decided to do.⁸⁹ This cannot be right, because morality is surely (at least in part) concerned with the perspective of potential victims of wrongdoing — with what may reasonably be justified *to others*.⁹⁰ Markovits criticizes impartial moralities for ignoring the perspective of Jim, but an exclusively agent-relative morality errs too far in the other direction by ignoring the perspective of the prisoners. Jim's agency is one thing that matters in the circumstances of the problem (and it certainly matters with particular salience to Jim) but the avoidable harm to nineteen innocent people is surely also a feature of the situation. In order to account for this complexity, it is

⁸⁷ NAGEL, *supra* note ____, at 183.

⁸⁸ *Id.* at 184.

⁸⁹ Korsgaard, *supra* note ____, at 298.

⁹⁰ See SCANLON, *supra* note ____, at 189. Furthermore, even if we accept Nagel's contention that shooting one innocent prisoner or twisting the child's arm is wrong in agent-relative terms because the agent incorporates evil into the description of her intent, we still need a way to define "evil" and distinguish it from other instances in which we hurt people but do not act wrongfully. A doctor may cause permanent harm in the course of providing reasonably skilled medical treatment, but does not thereby become a wrongdoer. Scanlon's suggestion is that we can flesh out the notion of wrongdoing with reference to what suitably motivated persons could not reasonably reject. Whether one agrees with this precise method of moral justification, I believe something like this process of reasoning must go on in the background before it is possible to describe any action as incorporating any evaluation into its description.

necessary to take account of the perspectives both of Jim and of the foreseeable victims of wrongdoing.

Viewing the world in exclusively impartial, agent-neutral terms seems like “an excessive demand to make of individuals whose perspective on the world is inherently complex and includes a strong subjective component.”⁹¹ This is the intuition behind Markovits’ critique of the hegemony of third-personal morality. Indeed in many cases involving family members and other close relationships, agent-neutral reasons strike many people as particularly thin grounds for explaining altruistic behavior.⁹² Markovits’ claim is not just about motivation. In his view, ethical value is a property of an agent’s practical identity. “[T]he destruction of a person’s integrity involves a great loss.”⁹³ Even granting that integrity is a source of value, and its destruction represents a great loss, more is needed to establish that integrity is the *only* source of ethical value. The effect of Markovits’ exclusive focus on the agent’s perspective is, ironically, to create a hegemony of first-personal morality over the interests of others, which presumably creates value as well. In order to defend this hegemony, it is necessary to offer reasons that matter to all affected persons, not just to the agent. Otherwise Jim and the innocent victims seem to be talking past each other. Jim says, in effect, “Don’t you see — I cannot shoot one of you because that would involve me in a relationship of authorship with wrongdoing.” The twenty

⁹¹ NAGEL, *supra* note ____, at 184.

⁹² See Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in CONSEQUENTIALISM AND ITS CRITICS 93, 94-96 (Samuel Scheffler ed. 1988) (using examples in which people give reasons in impersonal, detached, objective language to make the point that it can be difficult to represent important connections and attachments in agent-neutral terms).

⁹³ Markovits, *supra* note ____, at 243.

terrified potential victims respond, “Don’t *you* see? For you to keep your hands clean and refuse the captain’s bargain is to condemn nineteen of us to a needless death. Why are you so important that you can decide to preserve your own innocence at our expense?” I do not mean to caricature this conversation — the problem of representing personal and impartial perspectives in ethical deliberation is an extremely subtle one. The capacity to view the world from both a personal and an impersonal point of view may even be the central problem for ethical theory, as Thomas Nagel argues in *The View from Nowhere*. In my view, however, one should resist the temptation of finessing this problem by creating absolute priority rules — either ignoring the effect of impartial values on the agent’s personal integrity or using integrity as a trump over the interests of others, represented in impartial terms. Both agent-neutral and agent-relative reasons matter in ethics, and there is unfortunately no decision procedure that avoids the complexity of harmonizing these two perspectives in deliberation.

V. Integrity and the Conflict Between Ordinary and Institutional Values.

A. Political Roles and Dirty Hands.

Representing clients is essentially a political activity, in that lawyers assert and defend rights that are created and enforced by the power of the state. Lawyers enable clients to make use of the law, which in turn enables people to live together in conditions of relative peace and stability, despite deep and persistent disagreement about all sorts of issues, practical and moral. Because we disagree but also share an interest in working together on common projects, we find

it necessary to rely on political mechanisms to establish a provisional resolution of conflict. In order to create this settlement, it is necessary that the law preclude reference to the ordinary moral considerations that were the subject of disagreement. Lawyers who interpret cases, statutes, and regulations to permit or forbid their clients' activities, and who assist their clients in accomplishing various ends, should not be guided by the ordinary moral reasons that would otherwise apply, *qua* moral agent, to a person acting in a non-professional capacity. This is not amoralism, as some defenders of the lawyer's traditional role have argued,⁹⁴ but the appropriate recognition of institutional moral reasons for action, related to the social value of the law as providing a framework for co-existence and cooperation.

The distinctiveness of the law as a reason for action raises the possibility that ordinary and institutional moral domains are conceptually distinct. In a volume of posthumously published papers, Bernard Williams develops the argument that political moralism is wrongheaded.⁹⁵ By "moralism" Williams means the view that political action is essentially applied moral reasoning; he contrasts this with the realist (as in *Realpolitik*) position that politics is a distinctive mode in which humans relate to one another in a way that is fundamentally practical, but also has the effect of coercing people to do something that they may believe is not right.⁹⁶ A different way of drawing this distinction might be between different conceptions of the

⁹⁴ See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

⁹⁵ BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* (Geoffrey Hawthorne ed. 2005).

⁹⁶ *Id.* at 126-27.

good within ethics. For example, one might contrast the Christian conception of good as holiness with a very different conception of good, associated with Hobbes, Machiavelli, and Max Weber, which conceives of good (at least for politicians) as cunning, strength, resoluteness, the ability to improvise unconstrained by principles, and where necessary, violence and ruthlessness.⁹⁷ Weber points the point starkly in a passage from his essay *Politics as a Vocation*:

[H]e who lets himself in for politics, that is, for power and force as means, contracts with diabolical powers and for his action it is *not* true that good can follow only from good and evil only from evil, but that often the opposite is true. Anyone who fails to see this is, indeed, a political infant.⁹⁸

Lawyers are not Machiavellian princes, of course, and their involvement in wrongdoing is not generally necessary to avert a catastrophe on a par with an invasion or siege. In a more modest way, however, representing clients and doing things on their behalf may involve a lawyer in what she sincerely believes to be wrongdoing, but which the client is legally entitled to do.

Williams can be read as making either a strong or a weak claim about the relationship between the domains of political and moral value. The strong claim would be that these values are incommensurable because they are formally distinct. Thomas Nagel argues, for example, that the human capacity to view the world from a variety of perspectives creates a “fragmentation” of values into formally different types:

⁹⁷ See STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 162-65 (1989); Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 125-26 (H.H. Gerth & C. Wright Mills eds. 1946).

⁹⁸ Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER* 77, 123 (H.H. Gerth & C. Wright Mills, trans. and ed., 1946) (emphasis in original).

The capacity to view the world simultaneously from the point of view of one's relations to others, from the point of view of one's life extended through time, from the point of view of everyone at once, and finally from the detached viewpoint often described as the view *sub specie aeternitatis* is one of the marks of humanity. This complex capacity is an obstacle to simplification.⁹⁹

Williams might be relying on a formal distinction between institutional and pre-institutional perspectives for ethical evaluation. In that case these values would be literally incommensurable, in that there would be no criterion with respect to which they could be compared. However, Williams might be making a weaker point, namely that there is a way to compare ordinary and institutional values, but that institutional values must be understood as preempting consideration of ordinary values. One way to make this kind of claim about different domains of value is to distinguish between the justification of a practice, which relies on ordinary moral values, and the justification of “moves” within a practice, which would rely on the norms of the practice itself, i.e. institutional values.¹⁰⁰ In Rawls's example of promising, the norms of the practice of promising may preempt the actor from taking into account reasons that would otherwise count in an all-things-considered deliberation.¹⁰¹ This does not mean that the values that would go into the all-things-considered evaluation are formally distinct from, or incommensurable with the institutional values. Rather, there is a moral reason to recognize the institution of promising, even though that institution can only fulfill its function if its norms preempt all-things-considered

⁹⁹ Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128, 134 (1979).

¹⁰⁰ See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

¹⁰¹ *Id.* at 14-17; see also MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 27 (1973) (distinguishing between reasons the a person may recognize as bearing on her actions *qua* person, and those which can be taken into account in deciding how to act within a professional role).

moral judgments.

Whether the ordinary and institutional domains create incommensurable values, or whether it is the case that institutional values ultimately derive their force from considerations that have weight in the ordinary moral domain, the existence of these two domains creates the possibility of justified wrongdoing or, as it is called in political philosophy, the problem of dirty hands.¹⁰² The “dirtiness” of the agent’s hands is a function of being able to evaluate an act from multiple perspectives — such as institutional and ordinary moral values, or agent-neutral and agent-relative considerations. In the Jim and the Indians problem, Jim may believe that he is justified (or even required) by agent-neutral moral considerations to shoot one of the prisoners, yet may nevertheless believe himself to have engaged in wrongdoing from the standpoint of his own ground project of avoiding violence. Similarly, because of the law’s preclusive effect on ordinary moral reasoning, lawyers are morally required to do things “that honourable and scrupulous people might, *prima facie* at least, be disinclined to do,”¹⁰³ even if those things are justified on the basis of agent-neutral reasons such as the importance of protecting the rights of clients. The lawyer who engages in a legally obligatory vigorous defense of a client may do things that would be evaluated as lying or abusing in ordinary moral terms. The lawyer, and Jim,

¹⁰² See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 1 PHIL. & PUB. AFF. 160, 161 (1973) (“a particular act of government . . . may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong”); Bernard Williams, *Politics and Moral Character*, in MORAL LUCK 54, 61 (1981) (“In some cases the claims of the political reasons are proximate enough, and enough of the moral kind, to enable one to say that there is a moral justification for that particular political act, a justification which has outweighed the moral reasons against it. Even so, that can still leave the moral remainder, the uncanceled moral disagreeableness I have referred to.”); Thomas Nagel, *Ruthlessness in Public Life*, in MORTAL QUESTIONS 75, 82-83 (1979).

¹⁰³ Williams, *Politics and Moral Character*, *supra* note ___, at 57.

may be unable to satisfy the requirements of both domains of value, and therefore face the prospect of committing wrongs in either ordinary or institutional moral terms.

Naturally, one might expect a practitioner to feel alienated or agonized as the result of an institutional demand to do something that the agent would regard as wrong from the standpoint of her commitments and ground projects. Although the legal system and the social role of lawyers may be justified in some impartial, third-person sense, from the point of view of the individual practitioner it may be experienced as a direct relationship of connection with, or authorship of wrongdoing.¹⁰⁴ This is an important objection, but I have a hard time imagining how a system that is designed to handle moral conflict can function without the participation of officials and quasi-officials who in some sense participate in acts that may be experienced as wrongdoing from a first-person point of view.¹⁰⁵ Eliminating all connection with what the lawyer

¹⁰⁴ See Markovits, *supra* note ___, at 226-28, 261-62 (arguing that, even if the adversary system is justified as a means to impartially determine and protect the legal rights of citizens, lawyers still have to ask whether they are justified in first-personal terms in committing what would ordinarily be described as moral vices, such as lying and subverting justice).

¹⁰⁵ In a helpful overview presentation at the Auckland conference, Greg Cooper suggested that theories of legal ethics can be evaluated in terms of the extent to which they solve the problem of zeal and the problem of integrity. The problem of zeal refers to the capacity of a theory to capture what in legal terms is known as the agency nature of the lawyer-client relationship — that is, the right of the client to direct the lawyer's activities and to pursue her own lawful ends using the lawyer as an instrument to attaining those ends. In the American law of lawyering, the agency relationship is defined as follows: "[A] lawyer must, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000). The problem of integrity, on the other hand, refers to the ability within a theory of legal ethics to take account of the perspective of the lawyer, who remains a moral agent — as opposed to being legally an agent of the client — and who wishes to respect the demands of morality. (The problem becomes particularly one of integrity of one represents the demands of morality in Korsgaard's or Markovits' terms, as being true to one's practical identity or moral character.) One of Cooper's insights was that theories tend to do well with respect to one or the other of these problems, but seldom (if ever) solve both simultaneously. The theory I present here, which is strongly influenced by the ethics of political action, expressly trades off integrity for zeal. In my view, the legally constituted attorney-client relationship creates moral reasons for the lawyer to serve the law and the client's lawful ends. If the lawyer has constructed a practical identity in which this sort of action is important to her, then the lawyer's integrity may be unaffected. But a lawyer who does not incorporate this notion of lawyering into her practical identity may still be morally required to carry out the

believes would be wrongdoing in ordinary moral life — that is, seeking some kind of hyper-purity within an institutional role — is possible only at the expense of undermining the capacity of the institution to realize the goods for which it is constituted. Paradoxically, then, a lawyer who seeks to have no authorship relationship whatsoever with wrongdoing also commits moral wrongdoing, only this time in respect of the institutional reasons for respecting a valuable social institution. Integrity in ethics, at least the way Markovits understands it in terms of avoiding authorship of wrongdoing, belongs to a morality emphasizing innocence and purity, but at the expense of the ability to protect the rights of third parties whose interests are affected by the lawyer's refusal to get her hands dirty.

B. Moral Constraints on Ground Projects.

A different kind of problem with appealing to integrity as the source of normativity is that it seems all too contingent. If a lawyer happens to have a set of commitments that is inconsistent with abusing and harassing others, then it is possible to gain some normative and motivational purchase in arguing that she should not act like one of the well known examples of obnoxious lawyers familiar from legal ethics casebooks. But this does not seem to offer much argumentative leverage against someone with a different ground project. The contingency of ground projects is not only a basis for skepticism about morality, but also creates difficulties for arguments within ethics, to someone with a different set of ground projects. If the source of ethical value is primarily to be understood in agent-relative terms, there still seems to be an open

demands of her role, notwithstanding her lack of any integrity-based commitment to fulfilling those ends.

question (back to Moore!) as to why *morally* one ought to act on the basis of one's practical identity or ground projects. Korsgaard's neo-Kantian argument makes some progress toward answering this question, in that it shows that the normativity of one's practical identity is a function of the way in which it provides a reasoned basis — a criterion for choice — upon which the rational will can act. But just as Moore's open question argument asks why the recognition that something is good should move us to act to promote it, we can ask what it is about forming a practical identity that confers moral ought-to-be-doneness upon those actions.

The answer to the open question must be that some practical identities are better to adopt than others, for agent-neutral ethical reasons. Korsgaard faces this objection squarely:

The question how exactly an agent *should* conceive her practical identity, the question which law she should be to herself, is not settled by the arguments I have given. So moral obligation is not yet on the table.¹⁰⁶

And later she admits that “there is still a deep element of relativism in the system.”¹⁰⁷ But she believes the problem of relativism can be addressed by constraining the formation of practical identities with reference to universal moral values. Standing behind various particular practical identities (parent, psychologist, lawyer, and so on) is a general identity, “our identity as human, that is, as reflective animals who need to have practical conceptions of our identity in order to act and to live.”¹⁰⁸ One cannot lead a recognizably human existence with a commitment to viewing

¹⁰⁶ KORSGAARD, *supra* note ____, at 103.

¹⁰⁷ *Id.* at 113.

¹⁰⁸ *Id.* at 129.

oneself in these highly abstract terms. “Moral identity does not swamp other forms of identity: no one is simply a moral agent and nothing more.”¹⁰⁹ Practical identities are a specification or an instantiation of the general identity of humanity, and acquire ethical value only insofar as they embody respect for the value of humanity. Valuing oneself as a human agent (and forming a practical identity that is reason-giving) involves valuing others in that way as well.¹¹⁰ It would be incoherent to value oneself as a rational agent but think that other rational agents had no value.¹¹¹

This response to the problem of relativism seems right to me, but interestingly it comes at the cost of surrendering much of the agent-relativity of her ethical system. Korsgaard’s neo-Kantian approach turns out to be primarily Kantian, and only secondarily “neo-”. It shows the importance of some particularized practical identities in the motivational lives of people, and usefully combines “is” and “ought” statements via thickly described roles. Why should a lawyer take direction from her client, vigorously assert her interests against those of others, and seek to achieve her client’s lawful objectives? Because that is what it means to be a lawyer. Failing with reference to any of these obligations means being less than faithful to the role which the person has agreed to occupy. The reason-giving force of ethical obligations within the role is explained by the incorporation of the role into a person’s self-description, as an explanation for

¹⁰⁹ *Id.* at 125.

¹¹⁰ *Id.* at 121.

¹¹¹ *Id.* 117 (“The conception of *moral* wrongness as we now understand it belongs to the world *we* live in, the one brought about by the Enlightenment, where one’s identity is one’s relation to humanity itself.”). *See also* Herman, *supra* note ____, at 40 (“The attachment to morality is supposed to be unconditional. But this is compatible with the conditions of character: the moral agent is to be one who has a conception of himself as someone who will not pursue his projects in ways that are morally impermissible.”)

why she does the things she does — “because I’m a lawyer, and that’s what lawyers do.” As a metaethics for lawyers, this makes a great deal of sense. Still, it is not as strongly agent-relative as it may have seemed at first glance, because of Korsgaard’s insistence that practical identities must be given up if they are inconsistent with the (agent-neutral) value of humanity. Practical identity and its unity over time — i.e. integrity — play a crucial role in motivation and justification, but they are not the last word. Integrity is always checked by some impartial value.

Significantly, this impartial value enters the picture only at a fairly high level of generality. One must ask whether one’s ground projects are consistent with the value of humanity, but as long as they are, one is not further required to ask whether, in every case, one’s actions realize some impartial value. It is permissible, and may even be necessary as a condition for being an agent, to answer *particular* questions of what should be done with reference to one’s practical identity or ground projects. As Barbara Herman usefully suggests, the Kantian notion of the universal value of humanity enters into morality as a regulative ideal, ruling out certain projects as impermissible, but that does not mean that an agent “is not allowed only to act only on condition that his action will realize some impartial value in the world.”¹¹² In a case of serious conflict between one’s ground projects and moral value — understood in terms of the universal value of humanity — maintaining one’s integrity is not a sufficient reason to act contrary to impartial value.¹¹³ However, if there is a plurality of morally “eligible” ground

¹¹² Herman, *supra* note ____, at 39.

¹¹³ *Id.* (“The moral agent knows in advance that neither his identification of himself with a project nor the (true) fact that if he is unable to act as he wants his life will be emptied of meaning for him is sufficient to justify his acting against (serious) moral requirements.”).

projects, integrity in the sense of consistency with one's commitments is a sufficient reason to act in a given case.

I have sketched out what the incorporationist solution would look like, relying on the theoretical works of Korsgaard and Herman. Even if this approach is promising as a theoretical matter, it remains to be seen whether the ground projects of lawyers are consistent with the ethical value of humanity. Imagine the justification offered by a hypothetical public defender, who seeks to explain why it is ethically permissible to cross-examine (and even rudely badger) truthful witnesses, make arguments to the court with weak factual and legal support, and seek the acquittal of a factually guilty client. The project suggested previously of defending the oppressed and struggling against injustice seems as though it would be consistent with the value of humanity, but describing one's ground project in this way seems to beg the question against a critic who would describe the lawyer as engaged in a project of deception, harassment, and abuse. The description of the ground project here, in either institutional or ordinary values, is prior to the ethical evaluation of the project as a suitable object of commitment. Arthur Applbaum has argued that descriptions in ordinary moral terms persist, so that the lawyer cannot avoid ascriptions such as deceiver and abuser.¹¹⁴ He also argues that the concept of a practice (or an institution) does not itself impose constraints on the rules that might constitute and regulate the practice or institution.¹¹⁵ That may be true as a conceptual matter, about the notion of a practice or institution, but by analogy with the neo-Kantian approach of Korsgaard and Herman,

¹¹⁴ APPLBAUM, *supra* note ____, at 91-93.

¹¹⁵ *Id.* at 99.

a legal ethics theorist might contend that although the concept of a practice does not create moral constraints, the concept of a *morally worthy* practice does. As I argued earlier, with reference to Rawls' practice conception of rules, moral constraints are built in at the level of justifying the practice as a whole, leaving to the rules of the practice the evaluation of particular actions taken by a practitioner.¹¹⁶ The "slipperiness" of descriptions noted by Applbaum can therefore be mitigated by inquiring into the justification of the practice at this more general level. If the practice of representing criminal defendants is justified, then the actions taken by a public defender are appropriately described in evaluatively neutral or positive terms (e.g. cross-examining), instead of evaluatively negative terms (e.g. humiliating or deceiving).

Again, one of the central claims of the neo-Kantian approach to integrity is that an agent's commitments must ultimately withstand scrutiny from the impartial, agent-neutral standpoint of the value of humanity. Markovits, by contrast, would allow much less of a role for agent-neutral considerations to play a role in the evaluation of ground projects. It is hard to find in his account any description of an ethical "eligibility" analysis that is analytically prior to the evaluation of actions as warranted or not warranted by consistency with one's ground projects. In his reconstruction of the Jim and the Indians problem, Jim is a pacifist, or at least someone who is fortunate enough to live in a stable country in the developed world and thus have no need to consider whether it is necessary to kill innocent people to accomplish some political end. In

¹¹⁶ See *supra* note ____, and accompanying text. I applied this argument to the problem of client selection in legal ethics, in W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987 (2006).

Jim's "natural habitat,"¹¹⁷ he holds fast to a personal identity that precludes shooting the one innocent captive. That is well and good, but the lack of any real foundation of Jim's project in impartial morality is vividly demonstrated by Markovits' new character of Jane, who was not present in Williams' original telling of this tale. Jane has a different natural habitat. She is a citizen of the society which also includes the rebels and the counterinsurgency forces, and is pursuing political liberation for her people, despite knowing that her cause will occasionally demand violence. In a remarkable passage, Markovits explains how her environment has created in Jane a very different personal identity from Jim's:

Although Jane despises killing innocents, her ethical circumstances do not allow her the luxury of including "never kill innocents" in her own ethical projects. Jane's own self-originating first-person ethical ideals are much more hard-hearted than this. . . . [T]hey include maintaining the ruthlessness and self-control needed for making difficult and unpleasant choices, including the choice to sacrifice innocents, in pursuit of these goals [of overthrowing the military government].¹¹⁸

As I have noted, political action may sometimes involve justified wrongdoing. The problem is not that Jane is an inconceivable figure or someone whose actions are clearly unjustifiable. Rather, the problem is the pattern of justification Markovits gives for Jane's decision to accept the offer, and shoot one innocent captive. Jane can shoot the one captive, while Jim cannot, because Jane's natural environment has selected for ruthless, hard-hearted characters who are capable of shooting innocents.

¹¹⁷ Markovits, *supra* note ____, at 254.

¹¹⁸ *Id.* at 255.

Markovits would have us evaluate Jim as not justified in shooting one of the captives, and Jane as justified, *solely* because of the difference in their environments. There is no room in this analysis for the prior question, emphasized by Korsgaard and Herman, of whether the practical identities of Jim and Jane are consistent with the value of humanity. Granting that people grow up in different circumstances, and some are better able than others to shoot innocent people, this un-asked question lurks in Markovits' Jane story. I believe that question can only be asked from an agent-neutral point of view. Otherwise the perspective of the innocent victims drops out of the picture entirely, and we are left with the fairly solipsistic question from Jim's point of view, of whether he is willing to accept a relationship of authorship with the harm to the innocent captive. The answer to the question from the agent-neutral point of view must appeal to impartial ethical concepts such as values, consequences, rights, or virtues, not simply the circumstances in which the agent happened to grow up. To simply accede to the influence of one's environment would be the very antithesis of acting autonomously.¹¹⁹

If we do not simply take identities and ground projects as a given, but subject them to impartial ethical scrutiny, then Markovits' theory runs into a serious difficulty. His overarching professional ground project of fidelity to client ends and effacement of critical scrutiny by lawyers, may not be justifiable in impartial terms to affected institutions and individuals in society. The ideal of self-effacement means uncritically lending support to the ends of clients who may intend to cause serious harms, or at least may be indifferent to the harms resulting from their actions. To take one example from recent legal ethics scandals, high-level managers in the

¹¹⁹ Railton, *Moral Realism*, *supra* note ____, at 107-08.

finance and accounting departments at Enron were interested in manipulating the company's financial statements to hide substantial losses and conceal indebtedness, thereby artificially inflating the company's stock price. Lawyers worked extensively on every aspect of the transactions the company entered into, in order to realize these ends.¹²⁰ If they had asked hard questions, the lawyers would have realized that many of these transactions relied on aggressive interpretations of the accounting rules that virtually any impartial accountant (that is, one not receiving millions of dollars in fees from Enron) would regard as illegitimate. Markovits recommends that lawyers in that situation "make up [their] mind about nothing," entertain all sides of the argument sympathetically, be particularly keen to see things from the client's point of view, change positions as the client requires, refuse to judge for themselves, suppress their own ideas, and "self-effacingly empathize with whatever claims the client places before [them]."¹²¹ It is tempting to quote Samuel Johnson, recount the story of the collapse of Enron, and proclaim, "I refute Markovits thus!"¹²² It seems almost self-evident that self-effacement is a recipe for ethical disaster if followed scrupulously by lawyers. In fact, much of the public outcry against lawyers, after scandals like the Enron collapse and the disclosure of legal opinions justifying the torture of detainees captured in Afghanistan and Iraq, is directed at lawyers who acted merely as facilitators of their clients' goals, without exercising judgment with respect to the legal and factual merits of

¹²⁰ See, e.g., BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003); John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003).

¹²¹ These quotes are from Markovits, *supra* note ____, at 273-74.

¹²² See 1 BOSWELL'S *LIFE OF SAMUEL JOHNSON* 471 (G.B. Hill, ed., 1935). The "refutation" in the original quote was of Berkeley's idealism, and was supposedly accomplished by kicking a stone.

their clients' positions. Reasonable people may differ over how much responsibility lawyers should have as gatekeepers, and what evidence triggers a duty to investigate and rectify client wrongdoing, but apart from the context of criminal defense representation, the ideal of self-effacement seems to fail the test of impartial justification.

VI. Conclusion.

The turn to integrity in legal ethics is intended to mitigate the conflicts between ordinary and institutional values that arise in the lives of practicing lawyers. The most promising approach is the incorporationist solution, which relies on the adoption by agents of a ground projects that coincide with the values that constitute the professional role. Personal integrity thus bridges the normative gap between these domains which otherwise would raise the problem of dirty hands. This solution works only as long as the agent's ground projects can be justified in terms that are acceptable to (or cannot reasonably be rejected by) those who potentially are adversely affected by the agent's actions within the professional role. There is accordingly an agent-neutral dimension to the evaluation of ground projects, including professional roles. Once a project is justified at a general level, it gives agent-relative reasons for a person to do those things that are distinctive of the role. There are a lot of conditions on this pattern of ethical justification — a person must have a suitable ground project that coincides with the legitimate requirements of a professional role — but those lawyers whose personal commitments are ethically justified and in alignment with the requirements of the role may escape many of the tensions created by the divergence between ordinary and institutional values.